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U.S. Fish and Wildlife Service
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AESO/SE
Memorandum

January 28, 2004

To: Regional Director, Region 2, Albuquerque, New Mexico
(Attn: Luella Roberts) (ARD-ES)

From: Field Supervisor, Arizona Ecological Services Office, Phoenix, Arizona

Subject: Findings and Recommendations, and Transmittal of Documents Pertaining
to Issuance of an Incidental Take Permit for Exeter LXI, L.L.C.
Development of the Skyranch Project, Pima County, Arizona (TE-063647)

I. DESCRIPTION OF PROPOSAL

Proposed Action

Exeter LXI, L.L.C. (Exeter) has applied to the U.S. Fish and Wildlife Service (FWS) for an incidental take permit, pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The permit application is for the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) (pygmy-owl). The proposed action that would be covered by the permit is the development of 103 acres of pygmy-owl habitat on a 512-acre parcel for the Skyranch residential development (Project) in the Town of Marana, Pima County, Arizona. The Project will consist of up to 440 production lots, roads, and utilities. The requested duration of the permit is 5 years. The effects of the proposed development will be mitigated through the on-site conservation of 409 acres of pygmy-owl habitat, which will be conserved and managed in perpetuity. Contingency measures have been included in the event a pygmy-owl establishes a nest within 100 meters of the project. Under this circumstance, an additional 10 acres of disturbance would be allowed to compensate for areas set aside to avoid the nesting home range. As a result, up to 113 acres of development (22% disturbance) could occur, with a Reserve of 399 to 409 acres (78% - 80% of the property)

We anticipate that non-lethal harm or harassment of pygmy-owls may occur on the Property during construction and operation of the Project as follows:

- Two (2) non breeding pygmy-owls the first year of construction
- One (1) non-breeding pygmy-owl the second year of construction
- One (1) non-breeding pygmy-owl the last 2 years of construction and for the remainder of the permit.

The take anticipated above is not cumulative, but instead, what is likely to occur in the specific year or years identified. Thus, for example, if two dispersing owls are not detected on the Property the first year, the Applicant will not be covered for any additional take other than what is stated above for subsequent years.

Exeter has developed the *Habitat Conservation Plan and Environmental Assessment for a Section 10(a) Permit for Incidental Take of the Endangered Cactus Ferruginous Pygmy-owl for the Proposed Sky ranch Project in the Town of Marana, Pima County, Arizona* (Sky ranch HCP), incorporated herein by reference, in which they proposed to minimize and mitigate impacts from any expected incidental take of the pygmy-owl that may result from the proposed action. We analyzed the effects of the proposed action on the human environment in the Final Environmental Assessment (EA) for this action. We considered three alternatives in the EA, including a no action alternative (No Permit). The preferred alternative is issuance of an incidental take permit to allow the development and operation of the Sky ranch project in conjunction with the implementation of the Sky ranch HCP. The Modification of the Project Design alternative would involve issuance of a permit authorizing the development with larger lots, whereby portions of the Reserve would lie within the boundaries of deeded estate lots. This alternative would also include measures to minimize and mitigate the take of pygmy-owls. Draft versions of the Sky ranch EA/HCP and Implementing Agreement, and the final HCP were forwarded to you under separate cover. The Final EA is provided herein as Attachment 1.

The Sky ranch HCP fully describes both the location and design of the Sky ranch Project. The proposed action is the issuance of the permit in accordance with the Preferred Alternative and Proposed Design. As a condition of the permit, Exeter will fully implement the Sky ranch HCP. Sections 1.0, 3.1, and 4.1 of the final EA describe this proposed action in detail; pertinent information is summarized below.

We have attached a Finding of No Significant Impact (FONSI) for your consideration (Attachment 2). The FONSI selects the preferred alternative for implementation based on a variety of environmental and social factors, including potential impacts and benefits to pygmy-owls and their habitat, the extent and effectiveness of minimization and mitigation measures, and social and economic considerations. It also concludes that the preferred alternative is the environmentally preferable alternative because it surpasses other alternatives in realizing the full range of environmental policy goals.

Proposed mitigation

The Sky ranch HCP describes the measures to minimize and mitigate adverse effects of any expected take. Exeter has committed to implementing the Sky ranch HCP, including these measures (see Implementing Agreement, Attachment 3). These measures become terms and conditions of the incidental take permit (Attachment 4). Exeter will implement a number of conservation measures as part of the Sky ranch HCP in order to minimize and mitigate the anticipated loss of 103 to 113 acres of pygmy-owl habitat as a result of the implementation of the Project. The conservation measures will also address the anticipated non-lethal take of 4 non-breeding pygmy-owls due to harm and harassment

over a 4-year period of the 5-year permit. These conservation measures include establishment of a 399 to 409-acre reserve that will be conserved for the pygmy-owl in perpetuity (HCP 6.0). The Reserve will be established by 1) executing a conservation easement on 368 acres (90 %) of the reserve upon receipt of the incidental take permit, 2) executing a conservation easement on the remaining 41 acres of the reserve upon completion of the Project, 3) selecting a land manager, 4) developing and implementing a land management plan, 5) establishing an endowment for management and monitoring of the Reserve and 6) erecting a fence around the Reserve.

Within 6 months of the date of the permit, or prior to habitat disturbance, whichever occurs first, Exeter shall (IA: 10.1.d)

- Erect a fence around the Reserve
- Execute a Conservation Easement on the first 368 acres (90%) of the Reserve that incorporates the Reserve Manager and a third party right of enforcement for the Conservation Easement
- Select the entity that will hold the Conservation Easement, subject to the approval of the FWS
- Select the entity that will enforce the Conservation Easement, subject to the approval of the FWS

Within 12 months of the date of the Permit, Exeter shall (IA 10.1.e):

- Hire a Reserve Manager, subject to the approval of the FWS, who will be signatory to the IA
- Complete a Resource Management Plan for the Reserve that is acceptable to the FWS
- Complete a PAR analysis, subject to the approval of the FWS, to determine the amount of funding necessary for the endowment
- Establish an endowment fund sufficient to implement the Skyranch HCP, the Permit, and the IA.

Prior to the expiration of the Permit (IA 10.1.f)

The final 10 percent of the Reserve (approximately 41 acres) will be placed in a Conservation Easement subject to the management obligations for the Reserve in perpetuity.

Management of the Reserve will include the following elements:

- Exeter, with the approval of the FWS, will develop a Reserve Management Plan (RMP). The Reserve management entity (and until the entity is selected, the Permittee) will be responsible for implementing the RMP, including any adaptive management action. In addition, subject to the limitations stated herein, the Reserve management entity (and until the entity is selected, the Permittee), as

applicable, will cooperate with the FWS in the implementation of adaptive management actions (HCP 6.0, IA 10.1).

- Management objectives of the Reserve are, to the maximum extent practicable and subject to limitations on the commitment of resources, to (HCP 6.0, IA 10.1):
 - Maintain the Reserve's habitat in the naturally occurring conditions on-site at the time of acquisition; and
 - Protect the Reserve from damage or harm that may be caused by vandalism, motor vehicle use, livestock grazing, and free-roaming domestic animals.
- Only passive recreational activities will be allowed in the Reserve. Passive recreation includes public pedestrian and equestrian access to existing undeveloped trails that transect the Reserve (HCP 6.0).
- Equestrian use of the Reserve will be limited to common saddle stock (horses, mules, and donkeys). Access to the Reserve will be limited to passive recreational riding occurring on established trails. No saddle stock will be permitted off of established trails. No picketing or pasturage of saddle stock will be permitted on the Reserve at any time. All other forms of livestock will be strictly prohibited from the Reserve (HCP 6.0).
- Exeter will require adherence to the RMP, which addresses acceptable and prohibited uses and management actions. Vegetation disturbance and other activities (e.g. off-road vehicles, motorbike use/racing, firearm target practicing, jeep tours, and application of insecticides and herbicides) that might significantly degrade pygmy-owl habitat shall be restricted within the Reserve (HCP 7.2.1.1, Final EA 6.2.1.1).

Proposed Minimization measures

- In the event that a pygmy-owl enters the Project area during construction and establishes a territory or nest site, qualified biologists retained by Exeter will work with FWS to assess the situation. If FWS and Exeter's biologists determine that the arriving pygmy-owl has established a territory, Exeter will temporarily avoid activities in the vicinity of the nest or activity center and consult the FWS. A dispersing pygmy-owl that has been determined to occupy an area for 2 weeks or more shall be considered to have established a territory. The level of development activity in the vicinity of a new pygmy-owl territory or activity center will vary depending on the distance between the pygmy-owl site and the planned development. The presumed home range has been divided into four zones based upon the degree of proximity to the pygmy-owl site (HCP 7.2.1.1, Final EA 6.2.1.1).

- **Zone 1** – 0-100 meters from the pygmy-owl activity center
 - There shall be no removal of active nest sites and no land clearing activity within a 100-meter (330 foot) radius of a currently occupied pygmy-owl nest or activity center at any time.
 - Construction-related activities may continue on lands that have already been cleared of vegetation provided that they do not exceed the levels/intensity of activity that was occurring during the period of time that the pygmy-owl territory was established.
 - Activities that would be more intense or cause greater levels of noise disturbance than were occurring during the period of time that the territory was established cannot proceed during the pygmy-owl breeding season (February 1 through July 31).
- **Zone 2** – 100-400 meters from the pygmy-owl activity center
 - No additional clearing of vegetation will be permitted during the pygmy-owl breeding season (February 1 through July 30).
 - No restrictions on the nature or type of construction activity outside of the pygmy-owl breeding season (August 1 through January 31) provided it is consistent with the approved HCP and IA.
 - Construction activities during the pygmy-owl breeding season (February 1 to July 31) cannot exceed the levels or intensity of activity that occurred at the time the pygmy-owl territory was established.
- **Zone 3** – 400 to 600 meters from the pygmy-owl activity center
 - No additional clearing of vegetation will be permitted during the pygmy-owl breeding season (February 1 through July 31) without FWS approval.
 - No restrictions on the levels or intensity of construction activity (excluding the clearing of vegetation) at any time of the year provided it is consistent with the approved HCP and IA.
- **Zone 4** – Greater than 600 meters from the pygmy-owl activity center
 - No restrictions. Any activity consistent with the Project description provided in the HCP and the approved IA is allowed.
- FWS, in coordination with Arizona Game and Fish Department (AGFD) and Exeter's Environmental Consultant, will determine whether a pygmy-owl activity center or nest site exists and whether a change in status (i.e., abandonment) is appropriate, using the best available information, including survey detection and telemetry data (if available), and other monitoring information (HCP 7.2.1.1, Final EA 6.2.1.1).

- In addition to the above, in the event that a pair of pygmy-owls establishes a breeding territory within 100 meters of an area on the Property scheduled for construction, a 280-acre breeding territory will be designated. This 280-acre territory will be circular with the centroid being the nest or activity center. Because construction may need to be redesigned to accommodate a breeding pair of pygmy-owls, Exeter will be allowed to increase construction by one and one-half acres for every one-acre that needs to be adjusted. Development within the Project boundary may not exceed 22 % (HCP 7.2.1.1, Final EA 6.2.1.1).
- Only directional and low-intensity lights will be used within 100 meters (330 feet) of a new nest site or activity center to minimize potential adverse effects to resident pygmy-owls (HCP 7.2.1.1, Final EA 6.2.1.1).
- Land clearing, heavy equipment operation, and all other construction-related activities will be limited to the Project area. No construction-related activities, personnel, or equipment will be allowed into the Reserve (HCP 7.2.1.1, Final EA 6.2.1.1).
- Silt fence will be installed and maintained around the perimeter of the Project area in order to delineate the approved construction boundaries (HCP 7.2.1.1, Final EA 6.2.1.1).
- Exeter will develop and implement a Public Outreach program. The information will be distributed to potential homebuyers, neighbors, and other interested parties. The informational package will include a basic description of the conservation goals of the HCP and permit, emphasizing measures taken to protect the pygmy-owl. A copy of this informational brochure is found in Appendix C of the HCP (HCP 6.0).
- Exeter will develop an educational program, with FWS approval, to provide construction personnel and future residents of the Project with information regarding the pygmy-owl, long-term preservation, and limits to use of the Reserve. All construction management personnel will be required to attend an environmental training session conducted by Thomas Olsen Associates, Inc. (TOA), or a similarly qualified firm, prior to their participation in construction activities. This educational program will inform construction personnel of the following (HCP 6.0):
 - The Endangered Species Act:
 - Pygmy-owl ecology and regulatory status
 - The conservation goals of the HCP
 - The terms and conditions of the Permit
 - Actions to minimize and mitigate impacts
 - Development and reserve area boundaries
 - Specific limitations on construction activities on the Property
 - Prohibited activities
 - Reporting recommendations and requirements

- Exeter will implement a Residential Development Landscape Theme for the Project to maintain a desert theme, incorporating plant materials indigenous to, and blending in with, the Sonoran Desert (HCP 7.2.1.1, Final EA 6.2.1.1).
- Exeter will commission a Native Plant Salvage Plan. This plan will conform to all applicable state, county, and local regulations (HCP 7.2.2, Final EA 6.2.2).
- If practicable, saguaros will be preserved in place. If it is not practicable to preserve saguaros in place and if the saguaro is salvageable, it will be transplanted to an appropriate location. Exeter will make every reasonable effort to preserve saguaros in place. The FWS will be notified prior to the removal of saguaros and potential nest trees and given the opportunity to inspect them prior to removal. The FWS will have 15 days subsequent to notification to conduct their inspection. All FWS inspections will be conducted in the presence of a qualified biologist retained by Exeter (HCP 7.4, Final EA 6.4).
- Within the Project area, if salvage of a saguaro is not practicable, construction activities may proceed and can include destruction of saguaros, provided that they are inspected and determined to not be in current use for pygmy-owl nesting. If a saguaro must be destroyed, Exeter will plant three saguaros (minimum of 12 feet tall) as replacements (HCP 7.2, Final EA 6.2).
- Within the Project area, if inspected trees or saguaros are not being used for nesting by pygmy-owls, construction may proceed. Following inspections with negative results (no pygmy-owl detection), Exeter will require the developer and/or lot owner to cover the inspected cavities with wire mesh or other appropriate material to preclude use of the cavities by pygmy-owls until grading and construction activities have ceased. All cover material will be removed at the completion of building activities. Materials used to cover cavities will be placed in a manner that does not injure the plant (HCP 7.2, Final EA 6.2).
- Cavity inspection requirements will only apply to construction that is commenced during the pygmy-owl nesting period. No cavity inspection will be required for construction commenced outside of the pygmy-owl nesting period (HCP 7.3, Final EA 6.3).
- Natural buffers will be maintained along all roadways abutting and within the Property (HCP 7.2.1.1, Final EA 6.2.1.1).
- Natural buffers will be maintained along the perimeter of the development pods and lot lines adjacent to the Reserve, maximizing the conservation value of the Reserve (HCP 7.2.1.1, Final EA 6.2.1.1).
- Pet restrictions will be put in place for all residences in the Project as homeowner resolutions in order to guard against possible mortality to pygmy-owls, their prey species, and other wildlife. Dogs will be kept under control or leashed at all

times. Residents of the Project will be strictly prohibited from keeping free roaming cats (HCP 7.2.1.1, Final EA 6.2.1.1).

Proposed Surveys

- Exeter will conduct surveys (using the FWS approved survey protocol in effect at the time of such activity) prior to initiation of salvaging, clearing, or construction activities in all suitable pygmy-owl habitat on the Property. If vegetation disturbance activities within the Project area have not been completed prior to January 1 of any given year, pygmy-owl surveys will be conducted the following survey season according to protocol (HCP 7.2.1.1, Final EA 6.2.1.1).
- Exeter will conduct annual surveys on the entire Property using current survey protocol during the 5-year term of this HCP corresponding to the construction phase of the Project. Exeter will be responsible for funding these surveys. Personnel will conduct all surveys with appropriate survey permits from the FWS. Should any pygmy-owl be detected during these surveys, Exeter will notify the FWS as required under the conditions of the Surveyor's permit to conduct the survey (HCP 7.3, Final EA 6.3).
- After its selection, the Reserve management entity shall be solely responsible for the surveying, monitoring, and reporting requirements of the HCP applicable to the Reserve (HCP 7.3, Final EA 6.3).

Proposed Monitoring

- Exeter will employ Environmental Compliance Monitors (ECMs) during construction in order to ensure compliance with the terms and conditions of this HCP and the incidental take permit (HCP 7.2.1.1, Final EA 6.2.1.1). ECMs will be present on the Project area during the clearing, grading, and construction phases of the Project. These ECMs will have the authority to ensure that the Project is executed in compliance with all environmental regulations and permit conditions. Specific responsibilities of the ECMs will include, but not be limited to the following (HCP 7.2.3, Final EA 6.2.3):
 - Ensure that all construction management personnel have attended the environmental training session;
 - Prevent any unauthorized encroachment into the Reserve;
 - Monitor all construction activities;
 - Provide relevant biological information and assistance to construction personnel; and
 - Report any instances of non-compliance with environmental regulations.
- On-site monitoring will occur during the clearing, grading, and construction phase of the Project. The on-site monitor will ensure that all construction related activities would conform to the terms and conditions of the HCP and permit (HCP 7.2.3, Final EA 6.2.3).

- Should a pygmy-owl be detected on-site during annual surveys, a more in-depth monitoring effort may be implemented at the FWS's discretion. Prior to initiating these surveys, the FWS will coordinate with Exeter to ensure that there is no conflict between the telemetry protocol and the Permittee's activities on the Property. Exeter will fund this telemetry effort at up to \$1,000 per bird for up to five birds. The total potential maximum commitment of funds by Exeter for follow-up survey/telemetry is a total of \$5,000. All telemetry activities within the Property will be conducted in the presence of a qualified biologist retained by Exeter. Exeter's obligation to fund telemetry studies will cease within 1 year of completion of build-out, or upon the expiration date of the permit, whichever occurs first. On a confidential basis, a copy of the telemetry results will be provided to Exeter. The Permittee will not release this information to the public or otherwise make it available without the prior written consent of the FWS. Exeter's responsibility for funding telemetry studies is triggered by pygmy-owl detection on or immediately adjacent (within 600 meters) to the Property (HCP 7.3, Final EA 6.3).
- If it is determined that a pygmy-owl has established an active breeding territory on the Property, the Permittee will provide funding for AGFD to intensively monitor the activities of the breeding pair. Exeter will provide up to \$15,000 for this effort. It is hoped this intensive monitoring will provide the scientific community with valuable information regarding pygmy-owl breeding productivity, foraging ecology, habitat use, and time activity budgets. It is anticipated that the collection and analysis of this information will aid in the conservation and recovery of pygmy-owls. All monitoring activities within the Property will be conducted in cooperation with a biological consultant retained by Exeter. On a confidential basis, a copy of the monitoring results will be provided to Exeter. Exeter will not release this information to the public or otherwise make it available without the prior written consent of the FWS. Exeter's responsibility for funding intensive monitoring studies is triggered by the detection of an active pygmy-owl breeding territory on the Property. Exeter's obligation to fund monitoring studies will cease within one year of completion of build-out, or upon the expiration date of the permit, whichever occurs first (HCP 7.3, Final EA 6.3).

Proposed funding

- Exeter fully commits to ensure that adequate funding will be provided to meet all of its obligations in the Skyranch HCP. Exeter will ensure adequate funding to conserve and manage the Reserve in perpetuity, including all relevant requirements as described in the Skyranch HCP, the Permit, and the IA (IA 9.1).
- During the first 6 months of the permit, or prior to habitat disturbance, whichever occurs first, Exeter will provide sufficient funding to: 1) execute a conservation easement on 368 acres (90 percent) of the reserve, 2) erect a fence around the Reserve, and 3) implement all other relevant requirements of the Skyranch HCP, including surveys, monitoring and management of the Reserve (IA 9.2).

- No later than 12 months from the date of the permit, Exeter shall ensure that permanent funding is available to meet its continuing obligations under the Skyranch HCP. Exeter shall provide sufficient funding to: 1) hire a Reserve Manager, 2) complete a Resource Management Plan, 3) complete a Property Analysis Report to determine the cost of perpetual management and monitoring of the Reserve, and 4) establish an endowment consisting of a non-wasting account designated solely for the purpose of implementing the Skyranch HCP, Permit, and IA. Funding will be sufficient for land management, monitoring, surveys, recording of the subsequent conservation easement on the remaining 41 acres of the reserve, enforcement of the conservation easement, and other relevant conservation measures as detailed in the HCP. Principal will be placed in a non-wasting account designated solely for that purpose. Principal in the account will be of an amount to generate annual cash flow sufficient to satisfy Exeter's continuing obligations under the Skyranch HCP, as agreed to by FWS and Exeter. Cash flow will include that needed for inflation as measured by an annual index calculated by dividing the U.S. Department of Commerce's final estimate of the chain-type annual weights price index for the Gross Domestic Product for the most recently completed third quarter by the value of that same index for the third quarter of the prior year (IA 9.3).
- At least once every 3 years, Exeter shall contract for a third-party audit of the endowment to ensure that it is being managed appropriately. The cost of the audit shall be funded through the endowment (IA 9.4).
- Exeter will establish an endowment for the operation, management, and monitoring of the Reserve. Sufficient funding will be provided to establish and manage the Reserve, as well as provide the construction safeguards around those portions of the Reserve where Project development will occur (HCP 6.0; HCP 7.5, Final EA 6.5).
- The duration of the permit is 5 years. Exeter will provide funds necessary to manage the Reserve and implement the HCP in perpetuity. Until the Reserve management entity is selected and a RMP is adopted pursuant to the HCP and IA, the Permittee will provide such funds on an annual basis. As part of its yearly budget cycle, Exeter will estimate the costs of projects and programs called for in the HCP. The FWS will review annual activities and budget estimates. Funding allocations will be used on estimated costs of activities to be implemented in the coming year. Examples of HCP compliance costs include fencing, trespass control, education, trail design, erosion control, fire management, and wildlife management. In addition to the costs included in the annual management budget that will fund most of the required activities, Exeter will pay the costs associated with the recurring elements such as monitoring (including the costs of telemetry and more intensive monitoring upon detection of a pygmy-owl, or determination that a pygmy-owl has established an active breeding territory, on the Property as set forth in section 7.3 of the HCP and section 6.3 of the Final EA), reporting, and consultation with FWS, and with non-recurring elements such as pygmy-owl adaptive management and changed circumstances (HCP 7.5, Final EA 6.5)

- Promptly, upon issuance of the permit, Exeter will erect a fence around the Reserve and provide for construction of safeguards (silt fence) around those portions of the Reserve adjacent to the Project area where development will occur. The estimated cost of the fencing and safeguards is approximately \$40,000. The remaining costs to be paid directly by the Permittee on an annual basis will depend on the length of time required to select the Reserve management entity and adopt the RMP (HCP 7.5, Final EA 6.5).
- Exeter will submit a report of the amounts of annual funding and the endowment for FWS review (HCP 7.5, Final EA 6.5).
- Exeter will ensure that adequate funding for the HCP and any Changed Circumstances will be provided. A Property Analysis Report (PAR) will be completed by the Permittee to estimate the needed funding to implement the HCP until an RMP is complete and budgeted to the satisfaction of the Permittee and FWS (HCP 8.0).
- Exeter will provide such funds as may be necessary to carry out its obligations under the HCP during the term of the incidental take permit and for management of the Reserve in perpetuity. The Permittee will provide notice of any material change in the Permittee's funding resources to the FWS, including a discussion of the nature of the change. If the Permittee knows the prospective change more than 60 days before it occurs, the Permittee shall give the FWS 60-days notice thereof (IA 9.1).
- Exeter shall establish an escrow fund to be available solely to the Manager to support the activities of the Manager on the Reserve. Until Exeter and the FWS agree on the amount to be deposited in the fund and the fund is established, Exeter shall be responsible for providing funding directly to the Manager to support the Manager's activities on the Reserve or for expending funds itself on any activity required by the HCP or the IA on the Reserve to be undertaken prior to the selection of the Manager pursuant to paragraph 10.1.b. of the IA (IA 9.2).
- If Exeter and/or the Manager propose that another entity assume its or their funding and/or management obligations under the IA, Exeter and/or the Manager shall ensure that the assuming entity has sufficient funds to perform such obligations (IA 9.3).

Proposed Reporting

- By January 1 of each year for the life of the Permit, Exeter or the Reserve management entity will submit an annual written report describing the activities of the Permittee and the Reserve Management entity (or other pertinent parties) required by the HCP, IA, and the permit and an analysis of whether the terms of the HCP, IA, and permit were met for the reporting period (HCP 7.3, Final EA 6.3). The report shall provide all reasonably available data regarding the status of

- activities (e.g., pygmy-owl surveys, ongoing and completed construction phases), any incidental take of pygmy-owls, and where required by the FWS, any known changes to the overall population of pygmy-owl that occurred in or immediately adjacent to the Property during the reporting period. In addition, the Permittee will seek technical assistance from the FWS in implementing these terms and conditions in a manner most effective for minimizing impacts to the pygmy-owl. The report shall also include the following certification from a responsible company official who supervised or directed the preparation of the report:
- Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate, and complete.
- Compliance and effect/effectiveness monitoring and reporting requirements that are part of the HCP for the Project are summarized below. All reports will be sent annually on January 1 to the Field Supervisor of the FWS Ecological Services Field Office, Phoenix, Arizona. Failure by the Permittee to file a report is not a breach of this HCP unless and until either: 1) it is an intentional omission or 2) after notification by the FWS of the failure, the Permittee does not respond within 30 days (HCP 7.3, Final EA 6.3).
 - Cavity inspection Reports. Exeter will be required to submit any necessary nest-cavity inspection reports within 10 days of completion of fieldwork to the FWS Arizona Ecological Services Field Office.
 - Mortality Reports. Upon locating a dead, injured, or sick pygmy-owl, or any other endangered or threatened species, Exeter is required to contact the FWS Law Enforcement Office in Mesa, Arizona (480) 835-8289, for care and disposition instructions. Extreme care should be taken in handling sick or injured individuals to ensure effective and proper treatment. Care should also be taken in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured endangered/threatened species, or preservation of biological materials from a dead specimen, the Permittee and its contractor/subcontractor have the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

Analysis of Effects

The effects of the proposed action on the pygmy-owl are fully analyzed in the HCP (incorporated herein by reference), the final EA (Attachment 1), and the biological opinion for the proposed action (Attachment 5). Take would occur as a result of the development on up to 113 acres of pygmy-owl habitat, including lot development, road construction, and utility installation. Take in the form of non-lethal harm and harassment of 4 non-breeding pygmy-owls over a period of 4 years during the 5-year life of the Permit is anticipated.

II. PUBLIC COMMENT

The notice of availability of the Skyranch HCP/EA was published in the *Federal Register* on December 16, 2002, initiating a 60-day period for public review and comment (67 FR 77075). All concerned citizens and entities were provided a copy upon request. The public comment period closed February 16, 2003. We received five comment letters, including one State agency, one local municipality, and three special interest groups. The following is a summary of these comments and our response.

1. Comment: Allowing the take of individual pygmy-owls and their young and the loss of historically occupied habitat could jeopardize the continued existence of pygmy-owls in the area.

The Incidental Take Permit does not authorize the take of any breeding pygmy-owl or young. Take is restricted to non-lethal take of non-breeding pygmy-owls only. All pygmy-owl home ranges, or portions thereof, that occur within the Skyranch property will be conserved within the Project's open space reserve. Only one nesting home range overlaps the project boundaries. The area of overlap will also be conserved within the Skyranch Project's open space reserve. This breeding home range is not known to be currently active. We fully analyzed the effects of the proposed take in a biological opinion and concluded that such take would not jeopardize the continued existence of pygmy-owls because: 1) authorized take is non-lethal; 2) authorized take is for non-breeding pygmy-owls only; 3) if a pygmy-owl is detected on or within 600 meters of the Skyranch Project, measures will be implemented to avoid habitat and activity disturbance effects; 4) incidental take is not cumulative, i.e. take not occurring in the specified year does not carry over to subsequent years; 5) overall habitat disturbance within the Skyranch Project is limited to 20% to 22% of the 512-acre Property; 6) the 399 to 409-acre Reserve will continue to contribute to pygmy-owl conservation within the action area; and 7) annual reporting requirements will insure that the actions described in the HCP, the IA, and the incidental take permit are being implemented.

2. Comment: More clarification is necessary to define disturbance activities and their spatial relationship to pygmy-owl habitat use within the nest site.

The proposed project has been designed to avoid all known pygmy-owl home ranges that occur on or overlap the Skyranch Project. In addition, if a pygmy-owl establishes a nest within 100 meters of an area designated for development, the project will be reconfigured to avoid the nesting home range. Overall, total surface disturbance is limited to 20% to 22% of the Skyranch Property. Based on currently available information, this should retain pygmy-owl nesting and dispersal habitat values. None of the home ranges on or overlapping the Skyranch Project are currently known to be active. The project design provides for future use of the site by conforming to a configuration that we recommended to the applicant as suitable for use by pygmy-owls for breeding, foraging, nesting, and dispersal.

3. Comment: The term "compensatory habitat acquisition" should not be used since this implies that new habitat will be acquired, and there appears to be no replacement of

lost habitat.

The HCP has been revised to reflect that the mitigation will be achieved through on-site conservation of pygmy-owl habitat versus off-site acquisition.

4. Comment: Regional planning efforts for Pima County were taken in direct response to concerns that project by project planning is unable to adequately identify, minimize, and mitigate for potential cumulative effects to the species. The FWS should consider delaying approval for this plan so that it can be incorporated into the regional plan.

The proposed project is within the jurisdiction of the Town of Marana, not Pima County. The Town of Marana will incorporate the mitigation from this project into their reserve design as part of their regional conservation plan. While we agree that regional conservation planning provides for a more comprehensive reserve configuration and better addresses cumulative effects than individual projects, the Town of Marana's regional conservation plan will not be completed in a time frame conducive to the needs of this project.

5. Comment: Permitting the take of nearly one-quarter of the known population in an area so important to the conservation of the owl is clearly a violation of the ESA section 10(a)(2)(B) requirement that the taking must not appreciably reduce the likelihood of the survival and recovery of the species in the wild. No take of the species can occur without jeopardizing the pygmy owl's existence.

We agree that the lethal take of any pygmy-owl or any take of breeding pygmy-owls in the northwest Tucson metapopulation would result in significant impacts to the overall pygmy-owl population. In our biological opinion on this issuance of the permit, we concluded that, because the permit will authorize only the non-lethal take of non-breeding pygmy-owls, safeguards are in place within the project description to avoid effects to any breeding pygmy-owls, and because the project will conserve 78% - 80% of the pygmy-owl habitat on-site in a configuration that provides for pygmy-owl breeding, foraging, nesting, and dispersal, the issuance of the permit will not jeopardize the continued existence of the pygmy-owl.

6. Comment: Construction during the breeding season has a much higher potential for take and should not be permitted.

Exeter will conduct surveys for pygmy-owls prior to initiating salvaging, clearing, or construction activities in all suitable pygmy-owl habitat on the Property. If vegetation disturbance activities within the Project area have not been completed prior to January 1 of any given year, pygmy-owl surveys will be conducted the following survey season (HCP 7.2.1.1, Final EA 6.2.1.1). Exeter will also inspect saguaro cavities if construction is commenced during the pygmy-owl nesting period (HCP 7.3, Final EA 6.3). If a pygmy-owl does establish a territory or nest site in the Project area during construction activities, and we determine that the arriving pygmy-owl has established a territory, Exeter will temporarily avoid activities in the vicinity of the nest or activity center and

consult with us. A dispersing pygmy-owl that has been determined to occupy an area for 2 weeks or more will be considered to have established a territory. The level of development activity in the vicinity of a new pygmy-owl territory or activity center will vary depending on the distance between the pygmy-owl site and the planned development, as described in the HCP (HCP 7.2.1.1, Final EA 6.2.1.1). Based on these minimization measures, we believe that construction can proceed during the breeding season.

7. Comment: The development should be reconfigured to provide adequate dispersal to the northwest and southeast of the development.

The open space reserve protected as a part of the planned project should allow adequate dispersal habitat for pygmy-owls throughout the project site. The wash systems within the reserve will provide movement pathways in the north/south direction. Reserve open space within the northern and southern portions of the project, in conjunction with existing adjacent dispersal habitat north and south of the project, will provide for east/west movement across the project. We believe that opportunity for pygmy-owl movement exists throughout the project area.

8. Comment: Increasing construction levels in response to the presence of a breeding pair of owls is completely contrary to actions that should be taken to “minimize and mitigate” impacts to the owl.

In the event that a pair of pygmy-owls establishes a breeding territory within 100 meters of an area on the Property scheduled for construction, we will delineate a 280-acre breeding home range around it. This 280-acre home range will be circular with the centroid being the nest or activity center. Because construction may need to be redesigned to accommodate the breeding pair of owls, Exeter will be allowed to increase construction by one and one-half acres for every one-acre that needs to be adjusted. However, under this scenario, development within the Project boundary still cannot exceed 22 % (HCP 7.2.1.1, Final EA 6.2.1.1). Increasing the area of development provides Exeter greater flexibility to accommodate the pygmy-owl’s home range on-site. Given the importance of each breeding pair to the overall population, we believe that achieving protection of a breeding home range outweighs the potential loss of a small amount of open space reserve. We have determined that conserving 78 % of the open space on-site in this situation will still meet the permit issuance criteria for mitigating to the maximum extent practicable, as the revised configuration will still be required to meet connectivity goals and all other conservation guidelines (HCP 7.2.1.1, Final EA 6.2.1.1). In addition, based on the most current information that we have regarding the percent disturbance within pygmy-owl breeding home ranges, 22% still falls within the range of disturbance recorded.

9. Comment: All nesting sites currently known to be used by owls should be preserved in place. Destroying even one nest site known to be used by owls will likely result in take.

Based on recent surveys and monitoring, none of the pygmy-owl home ranges on or overlapping the Skyranch Project are currently active. No nesting sites have been identified within the area that will be developed. The nesting home site that overlaps the Property will be conserved within the open space reserve. Should a new nesting range be established in an area that would be affected by development, Exeter has incorporated the following, "There shall be no removal of active nest sites and no land clearing within a 100-meter radius of a currently occupied new CFPO (pygmy-owl) nest or resident CFPO activity center **at any time** (emphasis added)."

10. Comment: Cumulative effects are not adequately assessed and addressed.

We agree and have revised the EA to better address cumulative effects.

11. Comment: Mitigation that may occur from future developments is not certain in the foreseeable future and should not be included in the cumulative impacts analysis.

We agree. No statements to this effect are included in the EA, HCP, or BO.

12. Comment: There is no assurance of "adequate funding" for the management of the reserve or implementation of the HCP.

Language has been developed and included in the IA and Terms and Conditions of the incidental take permit that will assure adequate funding.

13. Comment: The impact of the project to the total acreage of critical habitat is a meaningless indicator of its effects to the pygmy-owl. The EA/HCP should include a calculation of the percentage of occupied critical habitat the project will impact.

We agree that effects to critical habitat are not based solely on size, but also location and impacts to primary constituent elements. We have revised the EA accordingly and analyzed the effects of the project on proposed critical habitat for the pygmy-owl in our biological opinion. We concluded that the action was not likely to adversely modify or destroy critical habitat because: 1) overall habitat disturbance within the Skyranch Project is limited to 20% to 22%; 2) measures have been incorporated to reduce indirect effects to pygmy-owl habitat (HCP 6.0 and 7.0, Final EA 6.0); and 3) the 399 to 409-acre Reserve will continue to contribute to pygmy-owl conservation within Unit 3 of proposed critical habitat.

14. Comment: The Permittee should be required to provide funding for monitoring throughout the life of the permit, not only through one year of completed build-out.

Exeter will employ Environmental Compliance Monitors (ECMs) during construction in order to ensure compliance with the terms and conditions of this HCP and the permit (HCP 7.2.1.1, Final EA 6.2.1.1). ECMs will be present on the Project area during the clearing, grading, and construction phases of the Project (HCP 7.2.3, Final EA 6.2.3). ECMs will ensure that all construction-related activities conform to the terms and conditions of the HCP and permit (HCP 7.2.3, Final EA 6.2.3). Exeter will conduct

pygmy-owl surveys and cavity inspections prior to initiating salvaging, clearing, or construction activities in all suitable pygmy-owl habitat on the Property. If vegetation disturbance activities within the Project have not been completed prior to January 1 of any given year, pygmy-owl surveys will be conducted the following survey season according to protocol (HCP 7.2.1.1, Final EA 6.2.1.1)

In addition, Exeter will conduct annual surveys on the entire Property using current survey protocol during the 5-year term of the permit corresponding to the construction phase of the Project. Should any pygmy-owl be detected during these surveys, Exeter will notify us as required under the conditions of the Surveyor's permit to conduct the survey (HCP 7.3, Final EA 6.3). After its selection, the Reserve management entity will be responsible for the surveying, monitoring, and reporting requirements of the HCP applicable to the Reserve. The Reserve Management Plan, funded by Exeter, will include ongoing monitoring to ensure long-term viability of the Reserve.

15. Comment: The presence of cats in the development is likely to encourage direct take. The Covenants and Regulations established by the Homeowner's Association should stipulate that cats are not allowed on the development and carry consequences for violation. Issues related to landscaping, exotic plants, and plant preservation should also be addressed.

Exeter will put in place pet restrictions for all residences in the Project as homeowner resolutions to minimize the potential for mortality of pygmy-owls, their prey species, and other wildlife. Dogs will be kept under control or leashed at all times. Residents of the Project will be strictly prohibited from keeping free-roaming cats. Free-roaming pets are not allowed in the Reserve area (HCP 6.0). In addition, Exeter will conduct public education and awareness programs for residents within and adjacent to the Property and development regarding the potential adverse effects of cats (HCP 7.1.1.1, Final EA 6.2.1.1). The Reserve Management Plan and the Reserve Manager will address these issues and insure implementation.

16. Comment: The EA/HCP should be revised to include a "no take" alternative. It is the only viable alternative that will not jeopardize the pygmy-owl's existence, considering its dire circumstances.

The EA analyzes a No Permit alternative. Under the No Permit alternative, we would not allow take because no incidental take permit would be issued to Exeter for development of the Skyranch project. Without a permit, Exeter would be expected to do everything within its control to avoid take of federally listed species associated with the Skyranch Property. This alternative is considered the No Permit or No Action alternative because a permit would not be necessary, and implementation of an HCP would not be required. As discussed above in Comment #1, we analyzed the effects of the preferred alternative, which is issuance of an incidental take permit to allow the development and operation of the Skyranch project in conjunction with the implementation of the Skyranch HCP, and found that it was not likely to jeopardize the continued existence of the pygmy-owl.

17. Comment: The Town of Marana bears no responsibility for ensuring that authorized changes to the development plans for the project are consistent with the HCP, Permit, and Implementing Agreement. That is the responsibility of the project proponent.

We will work with the Town of Marana, as necessary, to ensure that the final design of the Sky ranch Project is consistent with the HCP, Permit, and Implementing Agreement.

18. Comment: AGFD suggested that the discussion regarding the percent disturbance recorded for pygmy-owl breeding home-ranges be clarified to more accurately reflect the limitations of the interpretation of their data.

The best, currently available information on disturbance within pygmy-owl home ranges is the result of research being conducted by AGFD. We acknowledge that, while this is the best information currently available, there are limitations related to the interpretation of these data. We agree with AGFD that the conditions resulting in pygmy-owl use of disturbed sites have not been completely described or investigated. We have considered this in our evaluation of the effects of the Sky ranch Project on pygmy-owls in northwest Tucson.

19. Comment: Why isn't the Fulvous Whistling Duck included in the HCP?

Suitable habitat for the Fulvous Whistling Duck is not found on or near the Sky ranch Project area.

20. Comment: On-site monitors should be used at all times, not just during the breeding season.

We agree. On-site monitoring is now incorporated for all construction activities associated with the Sky ranch Project (see Comment #14 above).

III. INCIDENTAL TAKE PERMIT CRITERIA – ANALYSIS AND FINDINGS

- A. The taking of the affected species will be incidental.

Any take of the pygmy-owl will be incidental to the otherwise lawful development of the Project, as specified in detail in the Sky ranch HCP.

- B. The Applicant will, to the maximum extent practicable, avoid, minimize, and mitigate the impacts of taking the affected species.

We find that the Sky ranch HCP, IA, and Permit contain measures (as summarized earlier in this Findings document) to minimize and mitigate, to the maximum extent practicable, the impacts of take of the pygmy-owl under the permit. Exeter will minimize and mitigate the effects resulting from the development of 103 acres of pygmy-owl habitat and the anticipated incidental take through non-lethal harm or harassment of 4 non-breeding pygmy-owls by conserving 409 acres of pygmy-owl habitat on the Property in a configuration conducive to their continued breeding, feeding, foraging, and dispersal. The

project site contains or is overlapped by 4 known pygmy-owl home ranges, all of which are within the open space Reserve. No pygmy-owls are known to currently occupy any of these home ranges; therefore, the likelihood of lethal take is minimal. The 409-acre Reserve will be conserved in perpetuity through the execution of a conservation easement for the first 368 acres upon issuance of the Permit and for the remaining 41 acres upon completion of the project. The Reserve will be managed and monitored in perpetuity through the establishment of a non-wasting endowment that will pay for a Reserve Manager and the implementation of all relevant conservation actions outlined in the HCP, IA and Permit. The endowment will be established within 12 months of the issuance of the Permit. Prior to its establishment, Exeter will fund all conservation commitments through its yearly budget cycle.

Contingency measures have been included in the event a pygmy-owl establishes a nest within 100 meters of the project. Under this circumstance, an additional 10 acres of disturbance would be allowed to compensate for areas set aside to avoid the nesting home range. As a result, up to 103 acres of development (22% disturbance) could occur, with a Reserve of 399 to 409 acres (78% - 80% of the property).

Currently, the best information regarding the amount of development occurring in successfully breeding pygmy-owl home ranges comes from data being gathered by the AGFD. In home ranges (estimated to be 280 acres in size) where successful nests have been located, disturbance ranged from 16% to 54% with a mean of 33%. There are limitations to the data on which these numbers are based such as the small sample size, the limited number of years over which these data have been gathered, and the absence of data qualifying the disturbance types. However, it represents the best information upon which we can currently base our analysis. The habitat disturbance that will result from the development of the Skyranch Project represents 20 to 22% of the habitat on the Property which is within the range of disturbance where successful nests have been located and is below the mean value of 33%.

We, therefore, find that the mitigation and minimization measures provided in the Skyranch HCP, IA, and the incidental take Permit are adequate to provide substantial benefits to the pygmy-owl and are the maximum that Exeter can practically implement and still have an economically viable project. Commitments that are key to this finding are as follows:

Within 6 months of the date of the permit, or prior to habitat disturbance, whichever occurs first, Exeter shall (IA: 10.1.d)

1. Erect a fence around the Reserve
2. Execute a Conservation Easement on the first 368 acres (90%) of the Reserve that incorporates the Reserve Manager and a third party right of enforcement for the Conservation Easement
3. Select the entity that will hold the Conservation Easement, subject to the approval of the FWS

4. Select the entity that will enforce the Conservation Easement, subject to the approval of the FWS

Within 12 months of the date of the Permit, Exeter shall (IA 10.1.e):

1. Hire a Reserve Manager, subject to the approval of the FWS, who will be signatory to the IA
2. Complete a Resource Management Plan for the Reserve that is acceptable to the FWS
3. Complete a PAR analysis, subject to the approval of the FWS, to determine the amount of funding necessary for the endowment
4. Establish an endowment fund sufficient to implement the Skyranch HCP, the Permit, and the IA.

Prior to the expiration of the Permit (IA 10.1.f)

The final 10 percent of the Reserve (approximately 41 acres) will be placed in a Conservation Easement subject to the management obligations for the Reserve in perpetuity.

C. The Applicant will ensure that adequate funding for the plan will be provided.

We have analyzed the funding commitments provided in the Skyranch HCP and the IA and determined that the Applicant will ensure that adequate funding for the plan will be provided. Exeter will conserve 399 to 409 acres of pygmy-owl habitat in a Reserve that will be managed in perpetuity. Exeter will execute a conservation easement over the first 368 acres of the Reserve immediately upon receipt of the Permit. The remaining 41 acres will be included in a conservation easement upon completion of the Project. Immediately upon issuance of the Permit, Exeter will erect a fence around the Reserve and provide for construction of safeguards (silt fence) around those portions of the Reserve adjacent to the Project area where development will occur. The estimated cost of the fencing and safeguards is approximately \$40,000. Exeter commits to providing the funding for the management, monitoring, surveys, and other pertinent elements in the HCP for up to 12 months as part of its yearly budget cycle. Within 12 months of the issuance of the permit, Exeter will hire a Reserve Manager, complete a Resource Management Plan, conduct a PAR to determine the costs of management and implementation of all commitments of the HCP, Permit, and IA, and establish an endowment which will incorporate inflation and the costs of adaptive management. Key to this analysis are the following funding assurances:

1. Exeter fully commits to ensure that adequate funding will be provided to meet all of its obligations in the Skyranch HCP. Exeter will ensure adequate funding to conserve and manage the Reserve in perpetuity, including all relevant requirements as described in the Skyranch HCP, the Permit, and the IA (IA 9.1).

2. During the first 6 months of the permit, or prior to habitat disturbance, whichever occurs first, Exeter will provide sufficient funding to: 1) execute a conservation easement on 368 acres (90 percent) of the reserve, 2) erect a fence around the Reserve, and 3) implement all other relevant requirements of the Skyranch HCP, including surveys, monitoring and management of the Reserve (IA 9.2).
3. No later than 12 months from the date of the permit, Exeter shall ensure that permanent funding is available to meet its continuing obligations under the Skyranch HCP. Exeter shall provide sufficient funding to: 1) hire a Reserve Manager, 2) complete a Resource Management Plan, 3) complete a Property Analysis Report to determine the cost of perpetual management and monitoring of the Reserve, and 4) establish an endowment consisting of a non-wasting account designated solely for the purpose of implementing the Skyranch HCP, Permit, and IA. Funding will be sufficient for land management, monitoring, surveys, recording of the subsequent conservation easement on the remaining 41 acres of the reserve, enforcement of the conservation easement, and other relevant conservation measures as detailed in the HCP. Principal will be placed in a non-wasting account designated solely for that purpose. Principal in the account will be of an amount to generate annual cash flow sufficient to satisfy Exeter's continuing obligations under the Skyranch HCP, as agreed to by FWS and Exeter. Cash flow will include that needed for inflation as measured by an annual index calculated by dividing the U.S. Department of Commerce's final estimate of the chain-type annual weights price index for the Gross Domestic Product for the most recently completed third quarter by the value of that same index for the third quarter of the prior year (IA 9.3).
4. At least once every 3 years, Exeter shall contract for a third-party audit of the endowment to ensure that it is being managed appropriately. The cost of the audit shall be funded through the endowment (IA 9.4).
5. Until the Reserve management entity is selected and a RMP is adopted pursuant to the HCP and IA, the Permittee will provide such funds on an annual basis. As part of its yearly budget cycle, Exeter will estimate the costs of projects and programs called for in the HCP. The FWS will review annual activities and budget estimates. Funding allocations will be used on estimated costs of activities to be implemented in the coming year. Examples of HCP compliance costs include fencing, trespass control, education, trail design, erosion control, fire management, and wildlife management. In addition to the costs included in the annual management budget that will fund most of the required activities, Exeter will pay the costs associated with the recurring elements such as monitoring (including the costs of telemetry and more intensive monitoring upon detection of a pygmy-owl, or determination that a pygmy-owl has established an active breeding territory, on the Property as set forth in section 7.3 of the HCP and section 6.3 of the Final EA), reporting, and consultation with FWS, and with non-recurring elements such as pygmy-owl adaptive management and changed circumstances (HCP 7.5, Final EA 6.5).

6. Exeter will ensure that adequate funding for the HCP and any Changed Circumstances will be provided. A Property Analysis Report (PAR) will be completed by the Permittee to estimate the needed funding to implement the HCP until an RMP is complete and budgeted to the satisfaction of the Permittee and FWS (HCP 8.0).
7. Exeter will provide such funds as may be necessary to carry out its obligations under the HCP during the term of the incidental take permit and for management of the Reserve in perpetuity. The Permittee will provide notice of any material change in the Permittee's funding resources to the FWS, including a discussion of the nature of the change. If the Permittee knows the prospective change more than 60 days before it occurs, the Permittee shall give the FWS 60-days notice thereof (IA 9.1).
8. Exeter shall establish an escrow fund to be available solely to the Manager to support the activities of the Manager on the Reserve. Until Exeter and the FWS agree on the amount to be deposited in the fund and the fund is established, Exeter shall be responsible for providing funding directly to the Manager to support the Manager's activities on the Reserve or for expending funds itself on any activity required by the HCP or the IA on the Reserve to be undertaken prior to the selection of the Manager pursuant to paragraph 10.1.b. of the IA (IA 9.2).
9. If Exeter and/or the Manager propose that another entity assume its or their funding and/or management obligations under the IA, Exeter and/or the Manager shall ensure that the assuming entity has sufficient funds to perform such obligations (IA 9.3).
10. Exeter will submit a report of the amounts of annual funding and the endowment for FWS review (HCP 7.5, Final EA 6.5).

D. The taking will not appreciably reduce the likelihood that the species will survive and recover in the wild.

The Act's legislative history establishes the intent of Congress that issuance criteria be based on a finding of "not likely to jeopardize" under section 7(a)(2) [see 50 CFR 402.02]. As a result, we have also reviewed the Applicant's permit under section 7 of the Act. In the biological opinion (Attachment 4), we concluded that issuance of the permit to the Applicant will not likely jeopardize the continued existence of the pygmy-owl, nor will it adversely modify proposed critical habitat for the following reasons:

1. The project site contains or is overlapped by 4 known pygmy-owl home ranges. However, no pygmy-owls are known to currently occupy any of these home ranges; therefore, the likelihood of lethal take is minimal. Effects to these home ranges will be minimized and mitigated through establishment of 78% to 80% of the Property as a habitat reserve that should allow for continued pygmy-owl breeding and dispersal.

2. Conservation measures will be implemented to mitigate to the maximum extent practicable direct and indirect effects to the pygmy-owl in the face of the declining pygmy-owl population status, baseline conditions characterized by reduced and fragmented habitat availability, and substantial cumulative effects. These measures include contingencies to avoid noise and habitat disturbance of any pygmy-owl that may establish a home range on or adjacent to the proposed project site.
3. Habitat disturbance will not exceed 104.12 acres (20% of the 512-acre project site [113 acres or 22% in the case of circumstances outlined in 7.2.1.1 of the HCP and 6.2.1.1 of the Final EA]; 0.142% of Critical Habitat Unit 3) and the disturbance will occur in a configuration that will still allow the potential for nesting and movement, therefore effects do not rise to the level of adverse modification of proposed critical habitat. These levels of disturbance are within the range of disturbance observed with known pygmy-owl nesting home ranges.
4. The effects of losing 103 to 113 acres of suitable habitat and the associated constituent elements will be partially minimized through the protection of approximately 399 to 409 acres within the Property boundaries (80% of the Property). These protected lands will remain undisturbed and be managed in perpetuity in a manner that will protect suitable habitat for the pygmy-owl and contribute to its conservation.
5. Conserved open space will maintain connectivity within the Property and to adjacent suitable habitat areas offsite, minimizing the contribution of the Sky ranch Project to adjacent cumulative effects.
6. Conserved open space will provide habitat suitable for breeding, sheltering, feeding, and movement, partially offsetting adjacent and regional cumulative effects.

Annual reports will be submitted to the FWS outlining the progress and extent of the implementation of pygmy-owl conservation measures and other actions outlined within the HCP The IA, and the incidental take permit.

E. Other measures, as required by the Director of the FWS have been met.

The Sky ranch HCP and proposed permit terms and conditions incorporate all elements that we have determined to be necessary for approval of the Sky ranch HCP and issuance of the incidental take permit.

F. Alternatives.

A more detailed description and analysis of the following Alternatives are contained in the EA.

Alternative 1 - Proposed Design (Preferred Alternative)

This is the preferred alternative described in detail in the Final EA and HCP (4.1 of both documents). This alternative proposes residential development on 103 acres of the 512 acre Property. Development will disturb approximately 20% of the Property. The remaining undisturbed open space (409 acres) will be conserved as a habitat reserve for the pygmy-owl. A Reserve Management Plan will be developed and a Reserve Manager hired. Measures will be implemented to ensure the conservation of the Reserve in its natural state. Ground disturbance within the Property will be limited to 20%. Contingency measures have been included in the event a pygmy-owl establishes a nest within 100 meters of the project. Under this circumstance, an additional 10 acres of disturbance would be allowed to compensate for areas set aside to avoid the nesting home range. As a result, up to 113 acres of development (22% disturbance) could occur, with a Reserve of 399 to 409 acres (78% - 80% of the property).

Alternative 2 – Modification of the Project Design

Under the Modification of the Project Design alternative, Exeter would develop 74 acres of production lots, 16 acres of estate lots, 10.9 acres of multi-family housing, and 1.5 acres of commercial development. The estate lots would be sold with deed restrictions limiting ground disturbance to a 21,000-square-foot development pad. The area outside the permitted building envelope would remain in its natural vegetated state. Management of open space within deeded lots is more difficult than in common areas. Multi-family and commercial developments also have the potential to have greater impact on pygmy-owls than single-family homes. The design layout for this Alternative is provided in the HCP.

Alternative 3 – No Permit (No action by FWS)

Under the No Permit alternative, we would not issue a permit to Exeter for development of the Skyranch project. Without a permit, Exeter would be expected to do everything within its control to avoid take of federally listed species associated with the Skyranch Property. This alternative is considered the No Permit or No Action alternative because a permit would not be necessary and implementation of an HCP would not be required. If the No Permit alternative were selected, Exeter would not proceed with conservation and management of the Reserve.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

We have no evidence that the permit should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). The Applicant has met the criteria for the issuance of the permit and does not have any disqualifying factors that would prevent the permit from being issued under current regulations.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, issuance of a permit to authorize incidental taking of the cactus ferruginous pygmy-owl by Exeter LXI, L.L.C. in accordance with the Sky ranch HCP and Implementing Agreement is recommended.

APPROVED AND CONCUR:

Steven L. Spangle, Field Supervisor

Date

Geoffrey Haskett, Deputy Regional Director

Date

/s/

cc: Assistant Field Supervisor, Fish and Wildlife Service, Albuquerque, NM

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